No. 14-1406

In The Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR HISTORICAL AND LEGAL SCHOLARS AS AMICUS CURIAE SUPPORTING RESPONDENTS

BETHANY BERGER
UNIVERSITY OF CONNECTICUT
SCHOOL OF LAW
65 Elizabeth St.
Hartford, CT 06105
bethany.berger@law.uconn.edu

COLETTE ROUTEL
Counsel of Record
MITCHELL | HAMLINE SCHOOL OF LAW
875 Summit Ave.
Saint Paul, MN 55105
(651) 290-6327
colette.routel@mitchellhamline.edu

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. CLEAR EVIDENCE OF CONGRESSIONAL INTENT IS REQUIRED TO DIMINISH RESERVATION BOUNDARIES 4

II. CONGRESS' REPUDIATION OF THE TRAGEDY OF ALLOTMENT UNDERSCORES THAT THE COURT SHOULD NOT AMPLIFY ITS IMPACT ABSENT CLEAR EVIDENCE OF CONGRESSIONAL INTENT 14

A. General Allotment History 15

B. Omaha Experience 22

C. Congressional Repudiation 29

III. RESOLVING CURRENT CONFLICTS ARISING FROM RESERVATION DEMOGRAPHICS MUST BE LEFT TO CONGRESS 30

CONCLUSION 34

APPENDIX

List of Amici Curiae 1a

TABLE OF AUTHORITIES

Page

CASES

Beck v. Flournoy Live-Stock & Real-Estate Co., 65 F. 30 (8th Cir. 1894) 25

Bond v. United States, 134 S.Ct. 2077 (2014) 11

Bryan v. Itasca County, 426 U.S. 373 (1976) 30

Buster v. Wright, 135 F. 947 (8th Cir. 1905) 21, 22

C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U.S. 411 (2001) 9

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 5

Comptroller of the Treasury of Maryland v. Wynne, 135 S.Ct. 1787 (2015) 32

Cook v. United States, 288 U.S. 102 (1933) 11

DeCoteau v. District County Court, 420 U.S. 425 (1975) 12

Donnelly v. United States, 228 U.S. 243 (1913) 21

Draper v. United States, 164 U.S. 240 (1896) 27

Ex Parte Crow Dog, 109 U.S. 556 (1883) 8

Hodel v. Irving, 481 U.S. 704 (1987) 18

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 8

Mattz v. Arnett, 412 U.S. 481 (1973) 12

Menominee Tribe v. United States, 391 U.S. 404 (1968) 10

Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024 (2014) 5, 8, 9

TABLE OF AUTHORITIES – Continued

Page

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 2, 10

Montana v. Blackfeet, 471 U.S. 759 (1985) 9

Morris v. Hitchcock, 194 U.S. 384 (1904) 22

Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010) 11

Morton v. Mancari, 417 U.S. 535 (1974) 6

Oklahoma v. Chickasaw Nation, 515 U.S. 450 (1995) 9

Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972) 27

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 32

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 12

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 5, 8

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) 30

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962) 13, 27

Smith v. Parker, 996 F. Supp. 2d 815 (D. Neb. 2014) 2

Solem v. Bartlett, 465 U.S. 463 (1984) 2, 12, 13, 33

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 12

TABLE OF AUTHORITIES – Continued

Page

Standing Bear v. Crook, 25 F. Cas. 695 (C.C. Neb. 1879) 24

Talton v. Mayes, 163 U.S. 376 (1896) 5

Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) 11

United States v. Bass, 404 U.S. 336 (1971) 11

United States v. Celestine, 215 U.S. 278 (1909) 5

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 6

United States v. Dion, 476 U.S. 734 (1986) 10

United States v. Kagama, 118 U.S. 375 (1886) 6

United States v. Lara, 541 U.S. 193 (2004) 5, 6, 7

United States v. McBratney, 104 U.S. 621 (1881) 4, 27

United States v. Nice, 241 U.S. 591 (1916) 27

United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941) 9

United States v. Sioux Nation, 448 U.S. 371 (1980) 8

United States v. Thomas, 151 U.S. 577 (1894) 21

Worcester v. Georgia, 31 U.S. 515 (1832) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 31

U.S. Const. art. I, § 8, cls. 11-12 5

TABLE OF AUTHORITIES – Continued

Page

U.S. Const. art. II, § 2, cl. 2 5

U.S. Const. art. IV, § 2, cl. 2 2

U.S. Const. art. IV, § 3, cl. 2 5

TREATIES AND STATUTES

25 U.S.C. §§ 461-63, 464-65 29

34 Stat. 80 (1906) 13

35 Stat. 460 13

Act of March 27, 1854, 10 Stat. 269 21

1865 treaty, 14 Stat. 667 10

Act of June 22, 1874, 18 Stat. 146 10

Act of July 31, 1882, 22 Stat. 179 20

Act of August 7, 1882, ch.434, 22 Stat. 341 ..... *passim*

Act of July 4, 1884, 23 Stat. 79-80 16

Act of March 3, 1885, 23 Stat. 362 21

Act of May 1, 1888, 25 Stat. 113, § 2 16

Act of March 2, 1889, 25 Stat. 94 17

Act of July 1, 1892, 27 Stat. 62 17

Act of Aug. 19, 1894, 28 Stat. 276-77 25

Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349) 19

Act of June 25, 1948, c. 645, 62 Stat. 757, *codified at* 18 U.S.C. § 115 29

TABLE OF AUTHORITIES – Continued

Page

Blackfoot River Land Exchange Act of 2014, Pub. L. No. 113-232 (Dec. 16, 2014) 32

Colorado River Indian Reservation Boundary Correction Act, Pub. L. No. 109-47 (2005) 31

Hoopa Valley Reservation Southern Boundary Adjustment Act, Pub. L. No. 105-79 (1997) 31

Indian Reorganization Act. Act of June 18, 1934, 48 Stat. 984 29

Pub. L. No. 103-16 § 12 (1994) 31

Pub. L. No. 113-88 (Jan. 3, 2014) 32

Pub. L. No. 113-119 (June 9, 2014) 32

Pub. L. No. 113-127 (July 16, 2014) 31

Pub. L. No. 113-134 (2014) 31

Pub. L. No. 113-179 (Sept. 24, 2014) 32

Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 14 Stat. 637 (1864) 20

Treaty with the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa, 10 Stat. 1165 (1855) 20

Treaty with the Omaha, 1854, 10 Stat. 1043, art. 1 ..... 2, 9, 27

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

23 U.S. Op. Atty. Gen. 214 (1900) 22

An Indian War Threatened – Settlers are Armed and Organized in Nebraska, Daily Inter Ocean (July 19, 1895) 26

Annual Report of Commissioner of Indian Affairs George Manypenny (Nov. 22, 1856), Sen. Exec. Doc. 34-5, *reprinted in Documents of U.S. Indian Policy* 89 (Francis P. Prucha ed., 3d ed. 2000) 14

Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) 10

Cohen's Handbook of Federal Indian Law § 2.02[1] (2012 ed.) 9

D. S. Otis, *The Dawes Act and the Allotment of Indian Lands* 8 (Francis Paul Prucha ed., 1973) 17, 18, 19

F. Cohen, *Handbook of Federal Indian Law* 208 (1982 ed.) 7, 20, 30, 31

Federal v. State – Government Wins Its Prosecution of Sheriff Mullin, The State (Columbia, S.C.), April 22, 1895 26

Francis P. Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (1976) 18

TABLE OF AUTHORITIES – Continued

Page

Francis Paul Prucha, 1 *The Great Father: The United States Government and the American Indians* 439 (1984) 14, 18, 20

Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (2001) 16, 19

Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) 7

Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 15 (1934) 22

Janet A. McDonnell, *Land Policy on the Omaha Reservation: Competency Commissions and Forced Fee Patents*, 63 NEBRASKA HISTORY 399-411 (1982) 28, 29

Jason M. Tetzloff, *Indian Removal: The Winnebago as Case Study, 1825-1875* (unpublished master's thesis, 1989) 23

Judith A. Boughter, *Betraying the Omaha Nation, 1790-1916* (1998) 25, 26, 27, 28

Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) 19

Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2014) 31

Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) 32

TABLE OF AUTHORITIES – Continued

Page

Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995* (1999) 26, 27

Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2014) 32

Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984) 7

Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) 10

Robert T. Anderson, Bethany Berger, Sarah Krakoff & Philip P. Frickey, *American Indian Law: Cases and Commentary* (3d ed. 2015) 7, 20

The Institute for Government Research, The Problem of Indian Administration 7 (1928) 18

U.S. Dept. Interior, *American Indian Population and Labor Force* 10 (2014) 34

William T. Hagan, *The Indian Rights Association: The Herbert Welsh Years 1882-1904* (1985) 17

INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are historians, political scientists, and law professors who teach and write about federal Indian policy and American Indian tribes. They file this brief in support of the Respondents.

SUMMARY OF THE ARGUMENT

Petitioners urge this Court to judicially diminish the Omaha Reservation without clear evidence of congressional intent because, they allege, its boundaries negatively impact the non-Indians living within them. To do so would violate fundamental rules of statutory construction, over a century of precedent regarding Indian affairs statutes, and the constitutional role of Congress in governing United States relationships with Indian tribes. It would further extend the devastating impact of allotment, contravening Congress' explicit repudiation of the policy in 1934. If the boundaries of the western part of the

[1] The parties have provided blanket consent to the filing of amicus briefs in this matter. No counsel for any party authored this brief in whole or in part. The amici and their counsel wrote this brief in its entirety. The cost of printing will be paid by the Tribal Supreme Court Project of the Native American Rights Fund ("NARF"). No person or entity other than amici, their counsel and NARF made a monetary contribution intended to fund the preparation or submission of this brief. Amici scholars file this brief as individuals and not on behalf of the institutions with which they are affiliated.

reservation create policy concerns today, Congress is fully capable of adjusting them. Because Congress has not done so, the Court must reject the invitation to do so itself.

In an 1854 Treaty, the Omaha Tribe ceded virtually all of its remaining lands in Nebraska to the United States. Treaty with the Omaha, 1854, 10 Stat. 1043, art. 1 ("1854 Treaty"); Joint Appendix ("J.A.") 886. In return, the United States promised tribal leaders a 300,000-acre reservation as their "permanent home." 1854 Treaty, art. 1, 6, 14; J.A. 886. Petitioners claim that despite this promise, Congress diminished the boundaries of that reservation when it passed an 1882 statute opening a portion of that reservation to sell to settlers. Petitioner's Brief ("Pet. Br.") at i.

Treaties are the supreme law of the land. U.S. Const., art. IV, § 2, cl. 2. While Congress can unilaterally alter the terms of a treaty, there must be "clear evidence" of its intent to do so. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). The lower federal courts in this case found none, *e.g.*, *Smith v. Parker*, 996 F. Supp. 2d 815, 837 (D. Neb. 2014), and the Petitioners admit to this Court that there is no such "clear evidence" here. Pet. Br. at i (noting that the question presented for review was "[w]hether *ambiguous* evidence concerning the first two *Solem* factors" forecloses a diminishment finding) (emphasis added). Instead, they argue that the western corner of the reservation is diminished because Nebraska has allegedly exercised jurisdiction over the area, and because it is owned and occupied primarily by non-members. *Id.* at 2.

The Court should not adopt the Petitioners' arguments. Doing so would require this Court to ignore more than 100 years of precedent regarding the role of Congress and the courts in Indian affairs and the solemnity of Indian treaties. The Petitioners' approach also jettisons general principles of statutory interpretation, which are, after all, designed to determine congressional intent. Demographic information and the actions of the State – an independent sovereign – in exercising jurisdiction over the area in question, bear little, if any, relation to *Congress'* intent.

The clear intent rule is particularly necessary in the allotment context. Congress believed that allotment would allow Indians to maintain title of the land allotted to them, becoming well-off farmers in communities shared with non-Indians. Instead, within just a few decades, two-thirds of allottees had lost their allotments to non-Indians, often in fraudulent or even blatantly illegal transactions. Although here Congress deliberately opened the area west of the railroad right-of-way to non-Indian settlement, syndicates of real estate speculators abused the law to acquire Omaha allotments throughout the reservation. The State of Nebraska and its subdivisions, moreover, illegally exercised jurisdiction over Indians throughout the reservation, not merely in its western corner.[2] When Congress diminished other reservations

---

[2] State jurisdiction over non-Indians is even less probative as to reservation status, as by 1882 it had already been established that states alone possessed criminal jurisdiction over

(Continued on following page)

in the allotment period, it did so clearly, by requiring complete cessions of all tribal interests or explicitly transferring the land to the public domain in exchange for a lump sum payment for the land ceded. In the absence of any of these indicia of clear intent, demographics and state claims of jurisdiction cannot be used to accomplish what Congress did not.

Congress is well able to adjust reservation borders if they create contemporary problems. Defining the boundaries of tribal territory is a congressional role exercised since the founding. Congress continues to consider and enact multiple bills affecting tribal territories each year. Congress, moreover, is the best institution to consider and balance competing claims and interests regarding the impact of those boundaries. If Petitioners are not happy with the action Congress took in 1882, it is to Congress, not the Court, that they must bring their claims.

ARGUMENT

I. CLEAR EVIDENCE OF CONGRESSIONAL INTENT IS REQUIRED TO DIMINISH RESERVATION BOUNDARIES

Since the founding of the United States, Indian tribes have been recognized as sovereigns, "domestic

---

crimes between non-Indians on reservations. *United States v. McBratney*, 104 U.S. 621, 624 (1881).

dependent nations" possessing "inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030 (2014); *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896); *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831). Congress, however, has broad authority to govern relations with tribal governments, including by diminishing their sovereign and property rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978). The congressional Indian affairs power has frequently been described as "plenary and exclusive," *United States v. Lara*, 541 U.S. 193, 200 (2004), and it has often been exercised in devastating ways. But as in cases in which Congress may invade the traditional authority of other sovereigns, this power has always been tempered by the rule that tribal rights remain unless there is clear evidence of congressional intent to the contrary. Because there is not clear evidence – indeed, no evidence – of congressional intent to diminish the Omaha Reservation in the 1882 Act, diminishment cannot be found.

Congressional power with respect to tribal nations derives from sources similar to the foreign relations power and is similarly broad. As with foreign relations, the Constitution vests Congress with authority over Indian affairs through the commerce, war, and territorial powers, U.S. Const., art. I, § 8, cls. 3 & 11-12; art. IV, § 3, cl. 2, and together with the Executive through the treaty power. U.S. Const., art. II, § 2, cl. 2; *see Lara*, 541 U.S. at 200-04 (finding authority in the commerce and treaty powers); *United States v. Celestine*, 215 U.S. 278, 284 (1909) (locating

authority in the territorial power); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (finding that the Constitution "confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.") (emphasis omitted). The Court has also suggested that Congress possesses power to regulate relations with tribal governments as one of the "necessary concomitants of nationality," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), part of the "right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." *United States v. Kagama*, 118 U.S. 375, 380 (1886) (upholding the Major Crimes Act despite finding that no specific provision of the Constitution authorized Congress to enact it); *see Lara*, 541 U.S. at 201 (suggesting that, as in *Curtiss-Wright*, Congress' Indian affairs power rests "in part, not upon 'affirmative grants of the Constitution,'" but on pre-constitutional national power); *see also Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (locating power in federal historic obligations to Native peoples as well as treaty and commerce powers).

The authority of Congress to regulate relationships with tribal peoples was clear at the founding and has continued to the present day. For "'the first century of America's national existence . . . Indian affairs were more an aspect of military and foreign

policy than a subject of domestic or municipal law.'" *Lara*, 541 U.S. at 201 (quoting F. Cohen, *Handbook of Federal Indian Law* 208 (1982 ed.)). The founders "drew on the law of nations to determine Native status," framing "nearly all issues of Indian affairs, including the question of land title, through the international law concept of sovereignty." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1059 (2015); *see* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 200 (1984) ("[T]he same powers that sufficed to give the federal government a free rein in the international arena were viewed as sufficient to enable the new government to deal adequately with the Indian tribes."). Although Congress ended treaty-making in 1871, it did so primarily to expand the power of the House of Representatives in Indian affairs. Robert T. Anderson, Bethany Berger, Sarah Krakoff & Philip P. Frickey, *American Indian Law: Cases and Commentary* 89-90 (3d ed. 2015). After 1871, Congress continued to interact with tribes as it would with governments, making war and peace, recognizing and withdrawing recognition from tribal governments, entering into "treaty substitutes" (agreements ratified by statute), and recognizing and adjusting tribal sovereign authority. *Id.* at 90.

This power emphatically belongs to Congress, not the judiciary. *See Lara*, 541 U.S. at 200 (noting that "we have consistently described" Congress' Indian affairs powers "as 'plenary and exclusive'") (citations

omitted). Thus, when the Kiowa, Comanche, and Arapaho Tribes challenged involuntary allotment of their lands, the Court declared that Congress' Indian affairs power "has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). While it is now established that the Constitution protects Indian tribes against congressional expropriation of their property, Congress retains broad discretion in Indian affairs. *See United States v. Sioux Nation*, 448 U.S. 371, 408, 409 (1980) (holding that Congress had "paramount power" as "trustee" of Indian land, but was required to provide compensation because it had not made a "good faith effort" to provide full value for taking the Black Hills).

Although Congress has tremendous power to limit the territory and sovereignty of Indian tribes, this power has always been tempered by the requirement that Congress "clearly" and "unequivocally" make its intent to diminish tribal rights known. *E.g.*, *Bay Mills*, 134 S.Ct. at 2032 ("Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."); *Santa Clara Pueblo*, 436 U.S. at 60 ("[P]roper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883) (disturbing traditional limits on federal jurisdiction "requires a

clear expression of the intention of congress"); *Cohen's Handbook of Federal Indian Law* § 2.02[1] (2012 ed.) ("[T]ribal property rights are preserved unless Congress's intent to the contrary is clear and unambiguous.").

For this reason, "clear" and "unequivocal[ ]" evidence is necessary to find Congress has abrogated tribal sovereign immunity. *Bay Mills*, 134 S.Ct. at 2031; *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001). Similarly, statutes will not be construed to permit state taxation of Indians and tribes in Indian country unless "Congress has made its intention to do so unmistakably clear." *Montana v. Blackfeet*, 471 U.S. 759, 765 (1985); *see also Oklahoma v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (finding state taxation unlawful "absent clear congressional authorization"). Even with respect to aboriginal property not acknowledged by formal federal action, "plain and unambiguous" or "clear and plain" evidence of congressional intent to abrogate is necessary. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346, 353 (1941).

This rule applies with particular force in cases such as this one, which involve the abrogation of treaty commitments to an Indian tribe. The Omaha Reservation was established as a result of the 1854 Treaty with the United States, when the Omaha Tribe agreed to "forever relinquish all right and title" to most of their former lands retaining only their current reservation. 10 Stat. 1043; J.A. 191-192. An

1865 Treaty and an 1874 Act explicitly altered the northern border of that reservation,[3] but did not touch its western boundary. Although "Congress may abrogate Indian treaty rights . . . it must clearly express its intent to do so." *Mille Lacs Band*, 526 U.S. at 202. What is "essential" is that there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 739-40 (1986); *see also Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) ("[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.").

This rule of construction is familiar from other areas in which Congress has power to adjust the relationship between governments. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 415-17 (1993); *see* Cass R.

---

[3] The language of these cessions stands in stark contrast with the 1882 Act. In the 1865 treaty, the Omaha Tribe agreed to "cede, sell, and convey to the United States" the land, and to "vacate and give possession of the lands ceded by this treaty immediately after its ratification" in exchange for a lump sum of $50,000 plus other considerations. 14 Stat. 667, art. 1-3, 5. In the 1874 agreement, Congress provided a lump sum of $82,000 for the purchase of an additional 12,000 acres for the Winnebago. Act of June 22, 1874, 18 Stat. 146, 170. In the deed of conveyance, the Omaha Tribe agreed to "sell and convey to the United States in trust for the Winnebago tribe of Indians, all the rights, title and interest of the Omaha Indians" in the land. J.A. 934.

Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 458 (1989) (discussing the requirement of a "clear statement before courts will find congressional displacement of the usual allocation of institutional authority"). Like treaties with Indian tribes, treaties with foreign nations "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)). Similarly, statutes will not be deemed to operate extraterritorially unless "the affirmative intention of the Congress [is] clearly expressed." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). In the same way, there must be clear evidence of congressional intent before a statute will be construed to intrude on state authority. *Bond v. United States*, 134 S.Ct. 2077, 2088-89 (2014). In each of these areas, Congress has power to act, but its action will undermine the traditional boundary lines between governments. In such cases, "'the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Bond*, 134 S.Ct. at 2089 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

For all these reasons, case after case establishes that opening a reservation to non-Indian settlement does not diminish reservation boundaries absent "clear and plain" evidence that Congress intended

diminishment. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *see Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Congress [must] clearly evince an intent to change boundaries before diminishment will be found.") (internal quotations omitted); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977) (same); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975) ("This Court does not lightly conclude that an Indian reservation has been terminated. . . . The congressional intent must be clear, to overcome the general rule that [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.") (internal citations omitted); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) ("[C]lear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.").

In this case, the 1882 Act and its legislative history provide no evidence whatsoever of congressional intent to diminish the Omaha Reservation. There is no language of cession or restoration to the public domain and no guarantee of a sum certain in payment for the lands. Instead, the Act simply states that the Secretary of the Interior is authorized to cause the land in question "to be surveyed," and if not chosen for a tribal member's allotment, the "unallotted lands are open for settlement" and can be "sold." J.A. 227 (Act of August 7, 1882, ch.434, 22 Stat. 341). The settlement was not even under the general homestead laws, but instead under "such rules and

regulations as [the Secretary] may prescribe." *Id.*; *see also* J.A. 939-940 (recounting ruling by the Secretary of the Interior that lands west of the right of way were not subject to the homestead laws because they were "in the Omaha Reservation"). The Act guarantees no lump sum to the Omahas in exchange for these lands, but rather provides that "the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act . . . shall be placed to the credit of said Indians in the Treasury of the United States." *Id.* at 229. Thus, the language in the 1882 Act is nearly identical to language that this Court has found *not* to result in diminishment in *Solem* and *Seymour v. Superintendent of Washington State Penitentiary*. *Solem*, 465 U.S. at 473 (finding 35 Stat. 460 authorizing Secretary to "'sell and dispose of all that portion of'" the reservations and deposit proceeds for the tribe "suggests the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent"); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356 (1962) (finding 34 Stat. 80 (1906), providing that certain lands would be "'open to settlement and entry under the provisions of the homestead laws'" and the proceeds would be "'deposited in the Treasury of the United States to the credit of the'" tribe "did no more than open the way for non-Indian settlers to own land on the reservation").

Only Congress can diminish a reservation's boundaries, and there must be clear evidence of its intent to do so. This rule follows over a century of

precedent requiring clear evidence of congressional intent to diminish tribal sovereign or property rights. In this case, because the 1882 Act provides no evidence of such clear intent, diminishment cannot be found.

II. CONGRESS' REPUDIATION OF THE TRAGEDY OF ALLOTMENT UNDERSCORES THAT THE COURT SHOULD NOT AMPLIFY ITS IMPACT ABSENT CLEAR EVIDENCE OF CONGRESSIONAL INTENT

Congress repeatedly disestablished and diminished reservations during the nineteenth and twentieth centuries, but it did so clearly, through statutes that restored all the land to the public domain or that ceded all interests of the relevant tribes in exchange for lump sum payments. Allotment was a different policy. It was intended to enable Native people to hold on to their allotted lands, become prosperous farmers, and open reservations to white settlers to prevent illegal incursions and enable Indians to learn from the white farmers in their midst.[4]

---

[4] Although Congress hoped that the policy would lead to the end of tribes and reservations, this had been the goal of federal Indian policy for decades. *See* Annual Report of Commissioner of Indian Affairs George Manypenny (Nov. 22, 1856), Sen. Exec. Doc. 34-5, *reprinted in Documents of U.S. Indian Policy* 89 (Francis P. Prucha ed., 3d ed. 2000) (describing reservation policy as "providing for the permanent settlement of the individuals of the tribes . on separate tracts of lands or homesteads, and for the gradual abolition of the tribal character"); Francis

(Continued on following page)

It utterly failed to achieve this intended result. Instead, allottees lost two-thirds of the lands that had been allotted to them, often in fraudulent and illegal actions. On the Omaha Reservation, real estate syndicates fraudulently acquired their lands and state and municipal governments illegally asserted jurisdiction over the Omahas.

In 1934, Congress decisively repudiated allotment and in 1948 codified earlier holdings establishing that Indian country encompassed all lands within reservations. Where Congress clearly intended to diminish a reservation, its intent must be respected. But interpreting white settlement itself to diminish a reservation is a perversion of congressional intent and the judicial role.

A. General Allotment History

Between 1880 and 1934, the majority of Indian lands passed to non-Indians. Prucha, *supra*, 2 *The Great Father* 896 (noting that 138 million acres was

---

Paul Prucha, 1 *The Great Father: The United States Government and the American Indians* 439 (1984) (quoting 1863 report of the Sioux agent that described the policy to "to break up the community system among the Sioux, weaken and destroy the tribal relations, individualize them by giving them separate homes in short, '*make white men of them*' "). Allotment, like the earlier policies, was designed to make Indians voluntarily give up their reservations and tribal status. As discussed below, when Congress was not prepared to wait for voluntary abandonment, it explicitly disestablished or diminished reservations. *See infra* Sec. II.A.

held by Indians in 1887, yet only 52 million acres remained in Indian hands by 1934); Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, 44 (2001) (noting millions of acres of land cessions in the early 1880s). Allotment, however, was not the only, or even primary, cause of land loss during this period. *See* Hoxie, *supra*, at 44 (attributing 60% of land loss during period to major land cessions between 1880 and 1895). Where Congress simply wanted to take lands from Indians in this period, it did so by acquiring the land straight out.

In 1884, for example, Congress declared that the vast Moses-Columbia Reservation in Washington would be "restored to the public domain," implementing an agreement in which the Indians agreed to "relinquish all claim upon the Government for any land situate elsewhere." Act of July 4, 1884, 23 Stat. 79-80 (ratifying Agreement with the Columbia and Colville, July 7, 1883). In 1888, the United States acquired 17.5 million acres from tribes in Montana, providing that the Indians would "cede and relinquish to the United States all their right, title, and interest in and to all the [ceded] lands . . . reserving to themselves only the reservations herein set apart for their separate use and occupation." Act of May 1, 1888, 25 Stat. 113, § 2; *see* Hoxie, *supra*, at 46 (reporting acres acquired). An 1889 statute acquired 9 million acres for the United States, dividing the Great Sioux Nation into seven separate reservations and providing that "all the lands outside of the separate

reservations herein described are hereby restored to the public domain" and that the act was a "release of all title on the part of the Indians." Act of March 2, 1889, 25 Stat. 94, §§ 16, 21. Similarly, in an 1892 statute, 1.5 million acres in the northern half of the Colville Reservation was "vacated and restored to the public domain, notwithstanding any [law] whereby the same was set apart for a reservation." Act of July 1, 1892, 27 Stat. 62. All of these statutes provided the Indians with a sum certain in exchange for the lands. When Congress wanted to diminish a reservation, it did so clearly.

Allotment was a different kind of policy, enacted with different purposes. The policy was urged by those calling themselves the "Friends of the Indian," and forwarded by reformers and progressives in Congress. William T. Hagan, *The Indian Rights Association: The Herbert Welsh Years 1882-1904*, at 12 (1985). In the words of Delos Otis, whose study of allotment was first published in 1934 as part of the legislative history of the Indian Reorganization Act, allotment "was regarded as a panacea which would make restitution to the Indian for all that the white man had done to him in the past." D. S. Otis, *The Dawes Act and the Allotment of Indian Lands* 8 (Francis Paul Prucha ed., 1973).

The policy emerged in part from the government's inability to fill its promises to protect Native people in their land. Policymakers bewailed their powerlessness before illegal incursions by railroads, settlers, and others onto federally-guaranteed reservations.

Prucha, *supra*, 2 *The Great Father* at 669. By providing Indians with full title to individual parcels and opening the rest to non-Indian ownership, allotment's proponents hoped to create both strong legal protections for Indians and a release valve for non-Indian demands. They also fervently believed, in the words of a 1928 government-commissioned study, that "some magic in individual property ownership" would transform Indians into prosperous Americanized citizens. *See The Institute for Government Research, The Problem of Indian Administration* 7 (1928). Upon its enactment, the Indian Rights Association joyously proclaimed that the day would be celebrated along with "Runnymede and Magna Carta, Independence and Emancipation." Quoted in Francis P. Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900*, 255 (1976). They were wrong.

As the Court has acknowledged, "[t]he policy of allotment of Indian lands quickly proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707 (1987). This was often the result of violations of law and policy by local communities, many times in alliance with the agents charged with implementing the policy. White pressure, for example, sometimes led allotting agents to designate the best lands "surplus," rather than allotting it to Indians. Otis, *supra*, at 147. Even where Indians had fertile allotments, they were expected to begin farming without equipment or capital to purchase it. *Id.* at 101-02. Some

only did so by mortgaging their entire crops to merchants – who then claimed the harvest. *Id.* at 146.

The Dawes Act initially provided that allotments would not be subject to sale, encumbrance, or taxation for twenty-five years. In 1906, under pressure to hasten the release of federal control, Congress authorized the Secretary of the Interior to issue a fee patent to any allottee believed "competent and capable of managing his or her affairs." Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349). The policy was expanded in 1913 to create "competency commissions," charged with "roaming the reservations in search of allottees who could be issued premature patents." Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 11 (1995). In contravention of federal law, the commissions issued patents to Indians who did not want them and who had no hope of keeping their land. In 1917, the Secretary of the Interior expanded the policy further still, to issue early patents to all Indians of less than one-half Indian blood. *Id.* at 12.

Both early patentees and those for whom the trust status expired lost their land in vast numbers. Federal Indian agents reported that "tax collectors, auto dealers, and equipment salesmen descended on the newly patented Indians." Hoxie, *supra*, at 183. "By the end of the allotment era, two-thirds of all the land allotted – approximately 27 million acres – had passed into non-Indian ownership." Royster, *supra*, at 12. Because intestate succession applied to all allotted lands and few Indians wrote wills, much of the

remaining land was divided among tens, sometimes hundreds, of heirs. Anderson, Berger, Krakoff & Frickey, *supra*, at 112-13.

The non-Indians who acquired lands within reservations had ample notice that jurisdictional rules were different there. Although the definition of "Indian country" was contested, Congress began using the term "reservation" to define the scope of federal jurisdiction at the dawn of the allotment period.[5] Just eight days before enacting the Omaha statute at issue here, Congress amended the Indian trader laws to provide that they would apply not only in the Indian country, but "on any Indian reservation." Act of July 31, 1882, 22 Stat. 179. When Congress enacted the

---

[5] The earliest definitions of "Indian country" did not refer to reservation status because they were developed before Congress embarked on the policy of confining Indians on "reservations." *See Cohen's Handbook*, *supra*, §§ 1.03[6][a] & 3.04[2][b]. Beginning in the 1850s, however, the United States entered into dozens of treaties creating reservations for Indian tribes. *See* Prucha, *supra*, 1 *The Great Father* at 334. Many of the reservations either already had non-Indian owned land within their borders, or contemplated sales of such lands. *E.g.*, Treaty with the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa, 10 Stat. 1165, arts. 2 & 6 (1855) (allowing sale of allotments in fee after five years, and purchase earlier by missionaries and others living with the Indians); Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 14 Stat. 637 (1864) (creating a six-township reservation that included various already "sold" lands). These treaties anticipated continued federal jurisdiction within reservation borders, *e.g.*, Treaty with the Mississippi, Pillager, and Lake Winnibigoshish Chippewa, 10 Stat. 1165, art. 7 (1855).

Major Crimes Act in 1885, it provided that it would apply "within the limits of any Indian reservation," even those within state boundaries, rather than in Indian country as the criminal sections of the Trade and Intercourse Acts had provided. *Compare* Act of March 3, 1885, 23 Stat. 362, 385 (act applies "within the boundaries of any state" and "within the limits of any Indian reservation") *with* Act of March 27, 1854, 10 Stat. 269, 270 (jurisdiction applies in "Indian country").

The Supreme Court repeatedly upheld such statutes, finding federal jurisdictional rules could apply "independently of any question of title." *United States v. Thomas*, 151 U.S. 577, 585 (1894). In 1912, the Court held that the old restrictive definition of "Indian country" no longer applied in the criminal context, and "nothing can more appropriately be deemed 'Indian country' . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation." *See Donnelly v. United States*, 228 U.S. 243, 269 (1913).

Precedent provided notice of the potential for tribal jurisdiction as well. In 1904, the Eighth Circuit – where the Omaha Reservation is located – upheld tribal jurisdiction to tax non-Indians on land they owned in fee. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905). The court rejected arguments that the ambiguity of the definition of "Indian country" for liquor laws controlled the case, stating that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy

in it." *Buster*, 138 F. at 951; *see also Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal power to tax non-Indians grazing cattle on land leased from individual allottees); 23 U.S. Op. Atty. Gen. 214 (1900) (affirming tribal jurisdiction to regulate non-Indian businesses on fee land on townsites within reservations).

By 1934, Commissioner of Indian Affairs John Collier would testify before Congress, the two-thirds of Indians who had been allotted were "drifting toward complete impoverishment" and about 100,000 Indians had become "totally landless." Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 15, 17 (1934). Allotment had deprived Indians of more than 80% of all land value, and 85% of the land value of allotted Indians. *Id.* at 17. Of the remaining land, half was "desert or semi-desert" and much of the rest was divided among numerous heirs, who could not use it profitably but could only lease it for "diminishing pittances of lease money." *Id.*

B. Omaha Experience

The Omaha experience is a microcosm of the tragedy of allotment. For hundreds of years, the Omaha people have lived in what eventually became the State of Nebraska. J.A. 875-76. Although the Omahas became powerful through trade with the French and Spanish in the eighteenth century, beginning in the 1800s, they were devastated by smallpox

epidemics and repeated attacks from Sioux war parties to the North and Sauk and Fox raiders from the East. J.A. 877-78. Beginning in 1815, the Omahas entered into a series of treaties with the United States, placing themselves under U.S. protection, pledging to protect merchants and travelers across their lands, and ceding their territory east of the Missouri. J.A. 878-83. Although the Omaha Tribe always abided by its treaties, the United States failed to provide the protection it promised. J.A. 880. By the 1840s, the Omahas were cut off from their traditional hunting grounds and Sioux raiders had burned their village to the ground. J.A. 883-84. In desperate need of food and funds, the tribe agreed to cede all but 300,000 acres of their remaining homeland to the United States. J.A. 884-89. With the exceptions of cessions of their northern lands to provide a home for the Winnebago in 1865 and 1874, the boundaries established by the 1854 Treaty remain today.

Although the 1854 Treaty promised the Omahas a "permanent home," by 1882 the Omahas had witnessed the tragic impact of removal on two related tribes, the Winnebago and the Ponca. The Winnebago had been forced to relocate four times in a few decades, from Wisconsin to Iowa to Minnesota to South Dakota, before fleeing to seek shelter on a portion of Omaha land in the 1860s. Jason M. Tetzloff, *Indian Removal: The Winnebago as Case Study, 1825-1875* (unpublished master's thesis, 1989). In the 1870s, a number of Poncas also fled to the Omaha Reservation after over one-quarter of the tribe died after forcible

removal to Indian Territory. A national campaign on behalf of the Poncas led to the famous case *Standing Bear v. Crook*, 25 F. Cas. 695 (C.C. Neb. 1879), and inspired Eastern ethnologist Alice Fletcher to travel to the Omaha Reservation.

On arriving, Fletcher found a community in great fear of forcible land loss, but divided about what to do about it. Omahas who had taken allotments under the 1865 treaty had been told that their certificates of title were worthless. J.A. 904-05. In 1882, Fletcher helped 50-odd Omahas petition Congress for title to their lands. The petitioners were clear that they represented a minority of the Omahas, the "citizen's party," J.A. 763, the faction "that wishes to become like white people." J.A. 765. But even for this group, the primary goal was to preserve the Omaha people on their reservation.

Kah-a-num-ba, or Two Crows, the first of the petitioners, explained that they had been "wanting titles ever since the Poncas were removed to Indian Territory," because without them, they had "been afraid that we should be taken from our lands, as the Poncas were." J.A. 788. Thomas McCanley concurred: "We were born here. We ought to stay here." *Id.* The others agreed. They wanted titles to their land "that this may be our home always," J.A. 779 (comments of Numba-mo-ni, Charles Webster) and to end the constant fear that "the Indians may be moved away." J.A. 768 (comments of Wah-jze-umba, Alvin Cox).

Although the petitioners had only asked for titles for their own land, the 1882 Act forced allotments on all Omahas. To satisfy Omaha desire for funds to finance improvements and agriculture and settler demands for access to the fertile Omaha reservation, Congress also opened the portion of the reservation west of the railroad right-of-way for non-Indian purchase and settlement. 22 Stat. 341. The Act guaranteed Omahas the right to choose allotments in this area, § 8, and a number of Omahas did so, becoming fixtures in government and business there. J.A. 208-10.

Although the 1882 Act provided that purchasers were supposed to pay for their lands in three yearly installments, Congress extended the time for payment four times between 1886 and 1894. J.A. 987. The 1894 Act specifically provided that the Act was conditioned on the consent of the Omaha Indians. Act of Aug. 19, 1894, 28 Stat. 276-77. This condition responded to requests of the settlers themselves, who acknowledged the continuing rights of the Omahas. J.A. 980. As a result of these delays, the Omahas, who sought to finance their own farming operations, "gained little from the sales of their western lands." Judith A. Boughter, *Betraying the Omaha Nation, 1790-1916*, 110 (1998).

Almost immediately, moreover, non-Indians began illegally leasing the Omahas' allotments in the eastern area, often for "ridiculously low rates." Boughter, *supra*, at 136; *Beck v. Flournoy Live-Stock & Real-Estate Co.*, 65 F. 30 (8th Cir. 1894) (holding

leases illegal). Real estate syndicates – dubbed the "Pender ring" – often paid the allottees a few cents an acre then leased the land to settlers at much higher rates. Boughter, *supra*, at 142-43, 146-47. The Thurston county sheriff even arrested tribal police enforcing federal law regarding the leases, and was then himself arrested with the approval of the United States. *See Federal v. State – Government Wins Its Prosecution of Sheriff Mullin*, The State (Columbia, S.C.), April 22, 1895. Later, William Peebles, a leader in one of the leasing syndicates, purchased 100 rifles to arm a resistance against the federal agent seeking to enforce the lease law. *An Indian War Threatened – Settlers are Armed and Organized in Nebraska*, Daily Inter Ocean (July 19, 1895). The uproar eventually subsided, but a few years later a new federal agent approved leases for huge tracts of land by a new gang of speculators, who quickly subleased to settlers for 50 to 200% profit. Boughter, *supra*, at 163-64.

Although Petitioner relies heavily on its alleged "longstanding exercise of jurisdiction" in the disputed area, Petitioner's Brf. at 32, it fails to mention that for many years it exercised jurisdiction over Indians on the entire reservation, not simply its western portion. Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995*, 16-17 (1999). This jurisdiction was not based on understandings of the borders of the reservation, but on the mistaken belief that by making allottees "subject to the laws, both civil and criminal, of the State of Nebraska," the 1882 Act removed the Omahas' protection from state

jurisdiction. *Id.* The Supreme Court, however, has made clear that identical language in the Burke Act did not change criminal jurisdiction for allottees. *Seymour*, 368 U.S. at 356 (holding allotment did not subject Indians to state jurisdiction on fee land); *United States v. Nice*, 241 U.S. 591, 600 (1916) (holding that the Burke Act language was "to be taken with some implied limitations, and not literally" and did not remove trust protection from allotted Indians). Nevertheless, Nebraska sporadically exercised jurisdiction in reliance on the Act until the 1970s, even after Nebraska had retroceded jurisdiction under Public Law 280. *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823, 835-36 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972) (rejecting jurisdiction under 1882 Act). State exercises of jurisdiction over non-Indians, of course, are irrelevant, as by 1882 the Supreme Court had already established that states had such jurisdiction within reservations. *Draper v. United States*, 164 U.S. 240, 247 (1896); *McBratney*, 104 U.S. at 624.

Violations of liquor laws added to the devastation allotment caused the Omahas. Prior to allotment, alcohol abuse had largely been stamped out by strict tribal controls. Boughter, *supra*, at 156; 1854 Treaty, art. 12 (noting that "[t]he Omahas are desirous to exclude from their country the use of ardent spirits, and to prevent their people from drinking the same"). But after allotment, liquor sellers surrounded the reservation and bootleggers entered it, often using alcohol to separate the Omahas from their lands.

Boughter, *supra*, at 171. Despite repeated federal campaigns, each time federal pressure lifted, the illegal sales resumed. *Id.*

During the 25-year trust period, non-Indians could not acquire Omaha allotments outright. But in advance of the expiration of the trust period, "speculators descended on the reservation and maneuvered the Indians into fraudulent land transactions." Janet A. McDonnell, *Land Policy on the Omaha Reservation: Competency Commissions and Forced Fee Patents*, 63 NEBRASKA HISTORY 399-411 (1982). A syndicate of Pender businessmen worked together to obtain advance sales of the lands. *Id.* When the federal Indian agent tried to stop them, they had him removed from office. *Id.* Finally, the evidence of fraud was so great that the President extended the trust period for another ten years, until 1919. *Id.*

To assuage angry speculators, however, the Omaha Reservation was the site of the first competency commission issuing early patents. McDonnell, *supra*, at 401-02. The commission was charged with only granting patents to those who knew English and could support themselves. Nevertheless, it issued patents to Omahas who could not write, read, or speak English, and to many who pleaded that they would lose their land if patented. *Id.* at 404-05. One patent, for example, was issued to Mrs. Blackbird, a sixty-five-year-old woman who spoke no English. On receiving the patent, she signed a document with a merchant that she was told would cancel her indebtedness to him. Instead, the document was a deed

transferring her $10,000 property to him for only one dollar. *Id.* at 406. By 1912, 90% of the patentees had lost their land, 8% was mortgaged, and only 2% remained in full Omaha ownership. *Id.* at 407.

C. Congressional Repudiation

By the 1920s, the government's Indian policies were under increasing scrutiny. Far from becoming self-supporting, the impoverished allottees were costing the government more each year. In response, Congress enacted the Indian Reorganization Act. Act of June 18, 1934, 48 Stat. 984. The Act decisively repudiates allotment. In the first section of the Act, Congress declared that "hereafter no land of any Indian reservation . shall be allotted in severalty to any Indian." *Id.* at § 1. The next sections continued the trust status of allotments perpetually, provided for the return to tribal ownership any unsold surplus lands, and authorized exchange and purchase of lands to consolidate the tribal land base. *Id.* at §§ 2-3. These laws remain in effect to this day. 25 U.S.C. §§ 461-63, 464-65.

In 1948, Congress made clear that all land within reservation borders was Indian country under federal jurisdiction "notwithstanding the issuance of any patent." Act of June 25, 1948, c. 645, 62 Stat. 757, *codified at* 18 U.S.C. § 1151. The law followed decades of action by both Congress and the Supreme Court to unify jurisdiction within reservations. *See supra* Sec.

II(A); *Cohen's Handbook*, *supra*, § 3.04[2][c] (discussing cases codified in Act).

As the Court has acknowledged, "courts 'are not obliged in ambiguous instances to strain to implement (an assimilationist) policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976) (quoting *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975)). Where the nineteenth-century Congress clearly acted to diminish a reservation, as it did repeatedly during the allotment period, that congressional action must be respected. But where Congress failed to do so in the past, it violates the balance of powers between the judiciary and Congress as well as current congressional policy for the Court to adjust boundaries on its own.

III. RESOLVING CURRENT CONFLICTS ARISING FROM RESERVATION DEMOGRAPHICS MUST BE LEFT TO CONGRESS

Lacking evidence of congressional intent, the Petitioners rest their claim largely on the demographics of the disputed area and the alleged expectations of the individuals there. They ignore the expectations of the tribe and its members, who have relied on the treaty promises of the United States and the language of the 1882 Act. The resolution of such modern day policy disputes is committed to congressional

authority and uniquely within the institutional capacity of Congress.

The power to determine where tribal boundaries lie is at the core of Congress' constitutionally defined authority to regulate "Commerce with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Congress has exercised vast authority to define and adjust the borders of tribal territory since the formation of the United States. *See Cohen's Handbook*, *supra*, § 15.05[2] (calling this a "major objective of early governmental policy"). Congress continues to actively consider and resolve issues of tribal territory. Members of Congress have introduced bills related to Indian lands in every congressional session from 1975 to the present. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 120-21, 178-79 (2014). Enacted laws frequently affect reservation boundaries.[6] Congress, moreover, is not bound by inertia in Indian affairs, enacting proposed bills at more than twice the rate at which it enacts bills on average. *Id.* at 87 In the most recent congressional session alone, Congress enacted six Indian land laws, including one to resolve a boundary dispute.[7]

---

[6] *See, e.g.*, Colorado River Indian Reservation Boundary Correction Act, Pub. L. No. 109-47 (2005); Hoopa Valley Reservation Southern Boundary Adjustment Act, Pub. L. No. 105-79 (1997); Pub. L. No. 103-16 § 12 (1994) (establishing and expanding Catawba Reservation).

[7] Pub. L. No. 113-134 (2014) (taking land into trust for the Pascua Yaqui Tribe); Pub. L. No. 113-127 (July 16, 2014) (taking

(Continued on following page)

Adjusting reservation boundaries is also far better suited to legislative than judicial resolution. *See* Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2014) (arguing that Congress rather than the judiciary has the institutional capacity to adjust tribal sovereignty). The judiciary, limited by evidentiary rules or the submissions of adversarial parties, lacks the capacity to "encompass and take into account the complex repercussions" of tribal boundaries on different groups and communities. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-95 (1978); *Comptroller of the Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1810 (2015) (Scalia, J., dissenting) (arguing that to "balance the needs of commerce against the needs of state governments . . . is a task for legislators, not judges."). Cases like this, where "the competing considerations . often will be subtle, complex, politically charged, and difficult to assess . . . the adjustment of interests" are uniquely appropriate for congressional resolution. *Cf. Reeves, Inc. v. Stake*, 447

---

lands into trust for the Shingle Springs Band of Miwok Indians); Pub. L. No. 113-119 (June 9, 2014) (taking lands into trust for the Sandia Pueblo); Pub. L. No. 113-88 (Jan. 3, 2014) (authorizing the Fond du Lac Band of Lake Superior Chippewa to sell or exchange non-trust lands); Pub. L. No. 113-179 (Sept. 24, 2014) (ratifying the Secretary of Interior's action to take land into trust for the Gun Lake Tribe); Blackfoot River Land Exchange Act of 2014, Pub. L. No. 113-232 (Dec. 16, 2014) (authorizing exchange of lands along reservation boundary).

U.S. 429, 439 (1980) (declining to hold state action violated interstate commerce clause).

Only Congress, moreover, can draw the fixed reservation boundaries necessary to avoid jurisdictional havoc. A rule like that urged by Petitioners, which permits judicial termination of reservation boundaries on inherently indeterminate and changeable standards like population and exercise of jurisdiction, would lead to an unworkable situation for all governments. If those arrested by a federal, tribal, or state government may resist jurisdiction by asking courts to weigh demographics and sift through contradictory jurisdictional history, it would add tremendous expense and exacerbate the existing law and order crisis facing Native people. While states will have jurisdiction and tribes will generally lack jurisdiction over non-Indians regardless of reservation boundaries, moreover, Omahas and other Indians relying on congressionally-drawn reservation boundaries might suddenly find themselves subject to state jurisdiction because a court finds their community has an insufficiently Indian character. This is yet another reason why "only Congress can divest a reservation of its land and diminish its boundaries" and "no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470.

Nor are non-Indians in such communities disadvantaged in appealing to Congress. Tribal citizens comprise less than one percent of the entire U.S.

population. *See* U.S. Dept. Interior, *American Indian Population and Labor Force* 10 (2014) (reporting 1,969,167 people were part of an Indian tribe in 2010). The State of Nebraska has already intervened on behalf of Pender. Should the citizens of Pender feel aggrieved at Congress' failure to diminish the Omaha Reservation in 1882, they can count on a fair hearing from Congress today.

CONCLUSION

This Court should uphold the decisions of the Eighth Circuit Court of Appeals and the federal district court and hold that the Act of August 7, 1882 did not diminish the Omaha Indian reservation on the western side of the railway line.

Respectfully submitted,

BETHANY BERGER
UNIVERSITY OF CONNECTICUT
SCHOOL OF LAW
65 Elizabeth St.
Hartford, CT 06105
bethany.berger@law.uconn.edu

COLETTE ROUTEL
Counsel of Record
MITCHELL | HAMLINE SCHOOL OF LAW
875 Summit Ave.
Saint Paul, MN 55105
(651) 290-6327
colette.routel@mitchellhamline.edu

Counsel for Amicus Curiae

Appendix

List of Amici Curiae

Gregory Ablavsky (J.D.) is Assistant Professor of Law at Stanford Law School. His scholarship focuses on the legal history of the early American West, particularly the history of federal Indian law. A lawyer and historian, his publications examining the history of Native sovereignty under federal law include *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) and *The Savage Constitution*, 63 DUKE L.J. 999 (2014).

Bethany Berger (J.D.) is the Thomas F. Gallivan, Jr. Professor of Real Property Law at the University of Connecticut School of Law. She is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (2005 & 2012 eds), co-author of two leading casebooks, *American Indian Law: Cases and Commentary* (with Anderson, Frickey & Krakoff), and *Property: Rules, Policies, and Practices* (with Singer, Davidson, and Penalver), and the author of many articles in the fields of American Indian law, legal history, and property law.

Kirsten Matoy Carlson (J.D., Ph.D) is an assistant professor at Wayne State University Law School. A lawyer and political scientist, her research focuses on governmental relations with indigenous peoples in the United States and other countries. Recent articles include *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015), and *Congress, Tribal Recognition, and*

Legislative-Administrative Multiplicity, forthcoming in the *Indiana Law Review*.

Richard B. Collins (J.D.) is a Professor of Law at the University of Colorado, Boulder. He teaches and writes in the areas of constitutional law, Indian law, and property. He is a co-author of *Cohen's Handbook of Federal Indian Law* (1982 ed.).

Seth Davis (J.D.) is an Assistant Professor of Law, University of California, Irvine School of Law, where he teaches and writes in the areas of Federal Indian law, property, federal courts, and administrative law. His articles have appeared in the *Columbia Law Review*, the *Notre Dame Law Review*, the *Wisconsin Law Review*, and the *Columbia Human Rights Law Review*. He is a co-author on the 2015 supplement to *Cohen's Handbook of Federal Indian Law*.

Gregory E. Dowd (Ph.D.) is a Professor of History and American Culture at the University of Michigan. He is the author of numerous books and articles on Native American history, including *War Under Heaven: Pontiac, the Indian Nations, and the British Empire* (2002), and *Spirited Resistance: The North American Indian Struggle for Unity, 1745-1815* (1992).

Joseph Genetin-Pilawa (Ph.D.) is Assistant Professor of History at George Mason University. He is author of *Crooked Paths to Allotment: The Fight Over Federal Indian Policy After the Civil War*, co-editor of *Beyond Two Worlds: Critical Conversations on Language and Power in Native North America*, and

author of many articles on the history of federal Indian policy and American Indian ethnohistory.

Frederick E. Hoxie (J.D., Ph.D.) is the Swanlund Professor of History, Law and American Indian Studies at the University of Illinois, Urbana-Champaign. His scholarship focuses on the history of indigenous peoples in North America. He has written numerous books, book chapters and articles including *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984), and "The Reservation Period, 1880-1960," in *The Cambridge History of the Native Peoples of the Americas, North America* (1995).

James McClurken (Ph.D.) is an independent historian and owner of McClurken Research. He is an expert on Native American history in the Midwest, and has written numerous books and articles on the subject. Dr. McClurken has also served as an expert witness in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

Lindsay Robertson (J.D., Ph.D.) is the Chickasaw Nation Endowed Chair in Native American Law at the University of Oklahoma College of Law. He teaches courses in Federal Indian law, legal history, and constitutional law, and has published articles and books in these subjects including a history of *Johnson v. McIntosh* entitled *Conquest by Law* (2005). He is a member of the American Law Institute.

Colette Routel (J.D.) is a Professor at Mitchell Hamline College of Law and Co-Director of the College's Indian Law Program, where she teaches and writes in the areas of Federal Indian Law, Property, and Natural Resources Law.

Judith Royster (J.D.) is a Professor at the University of Tulsa College of Law, where she writes and lectures in the areas of federal Indian law, civil procedure, environmental, and natural resources law. She is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (2005 & 2012 eds.), the co-author of *Native American Natural Resources Law: Cases and Materials*, and author of numerous articles in federal Indian law, including *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 11 (1995).

Mark R. Scherer (J.D., Ph.D.) is the Martin Professor of Western American History at the University of Nebraska-Omaha. He is the author of numerous books and articles on Native American history including *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995* (1999).

Joseph William Singer (J.D.) is Bussey Professor of Law at Harvard Law School, where his scholarship focuses on property law and federal Indian law. He is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (2005 & 2012 eds). He is the founding author of a leading casebook, *Property: Rules, Policies, and Practices*, and many books and articles on property and American Indian law.

Heidi Kiiwetinepinesiik Stark (Ph.D.) is an Assistant Professor of Political Science at the University of Victoria. Her scholarship focuses on treaty relationships with Indian tribes in the United States and Canada. She is the co-author of *American Indian Politics and the American Political System* (3d ed., 2010), and *Centering Anishinaabeg Studies: Understanding the World Through Stories* (2013). Her forthcoming book is entitled *Anishinaabe Treaty-Relations and U.S./Canada State-Formation* (2016).

Michalyn Steele (J.D.) is an Associate Professor of Law at the J. Reuben Clark Law School at Brigham Young University. She teaches courses in Federal Indian law, civil rights, and constitutional law. Her research focuses on separation of powers principles and tribal sovereignty. Her most recent article, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, is forthcoming in the UCLA Law Review (2016).

David Wilkins (Ph.D.) holds the McKnight Presidential Professorship in American Indian Studies at the University of Minnesota. He has published numerous books including *American Indian Politics and the American Political System* (3d ed., 2010), *Documents of Native American Political Development: 1500s-1933* (2009), *Uneven Ground: American Indian Sovereignty and Federal Law* (2002), and *Tribes, Treaties, and Constitutional Tribulations* (1999).